

RECENT DEVELOPMENTS

*Campbell v. Gen. Dynamics Gov't Sys. Corp.**

I. INTRODUCTION

Does an email communication give an employee adequate notice of a mandatory arbitration agreement, so that it is enforceable if the employee should subsequently bring a federal discrimination claim? Can companies take advantage of the informality, speed, and convenience of email when communicating arbitration agreements to their employees? Does an email even constitute a written agreement under the confines of the Federal Arbitration Act? The case of *Campbell v. General Dynamics Gov't Sys. Corp.* addresses the use of email technology in providing notice for arbitration agreements.¹ The *Campbell* decision could have a lasting impact on companies who use email to communicate new and binding policies to their employees. After *Campbell*, employers will need to inform their employees about company policies in a more effective and conspicuous manner than mass email alone.

II. FACTS AND PROCEDURE

On April 30, 2001, General Dynamics² sent a mass email to its entire work force regarding the implementation of a new dispute resolution policy ("the Policy").³ The email took the form of a single-spaced page-long letter, addressed "Dear Fellow Employee," from the company president.⁴ The introductory paragraphs were vague and innocuous,⁵ stating that General Dynamics was "a leader in a very competitive marketplace" and that it was committed to "open, forthright and honest communication," especially when "addressing and resolving employee issues concerning legally protected

* *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005).

¹ *Id.* The lower court opinion is *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 321 F. Supp. 2d 142 (D. Mass. 2004).

² General Dynamics is a company specializing in military and business technology, including aerospace design, combat systems, information technology, and marine systems. See General Dynamics, <http://www.generaldynamics.com> (last visited Feb. 21, 2006).

³ *Campbell*, 321 F. Supp. 2d at 144.

⁴ *Id.*

⁵ *Id.*

rights and matters.”⁶ The email explained further that the company had developed a new policy to handle legal issues arising out of workplace disputes.⁷ The Policy itself was not contained in the email, but rather was accessible through two hyperlinks⁸ at the bottom.⁹ The first hyperlink opened a brochure, and the second opened an employee manual, both giving more details about the Policy.¹⁰ General Dynamics also posted the new Policy on its company intranet.¹¹ The Policy was speedily enacted, becoming effective and binding the day after the email was sent.¹²

The email referred to the actual policy in (what the district court characterized as) “broad terms” with “a vague reference to the issues it encompassed.”¹³ The email did describe, however, the Policy’s four-step approach to dispute resolution, including the last step of “arbitration by a qualified and independent arbitrator.”¹⁴ The email mentioned that the new policy was an “essential element” of the “employment relationship.”¹⁵ The Policy itself, which included a waiver of the employee’s right to access a judicial forum, was not further described in the email.¹⁶

⁶ *Campbell*, 407 F.3d at 548.

⁷ *Campbell*, 321 F. Supp. 2d at 144.

⁸ A ‘hyperlink,’ or ‘link’ for short, is “a reference in a hypertext document to another document or other resource,” which “can be used to fetch the resources referenced” and “can then be saved, viewed, or displayed as part of the referencing document.” See Wikipedia, <http://en.wikipedia.org/wiki/Hyperlink> (last visited Feb. 19, 2006).

⁹ *Campbell*, 321 F. Supp. 2d at 144.

¹⁰ *Id.*

¹¹ An intranet is a “local area network [a computer network covering a local area] used internally in an organization to facilitate communication and access to information that is sometimes access-restricted.” See Wikipedia, <http://en.wikipedia.org/wiki/Intranet>; http://en.wikipedia.org/wiki/Local_area_network (last visited Feb. 19, 2006).

¹² *Campbell*, 321 F. Supp. 2d at 144.

¹³ *Id.* The company’s email read, “We have developed the Dispute Resolution Policy (‘DRP’) to address legal issues raised by either an employee or General Dynamics Communication Systems.” *Id.*

¹⁴ *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 407 F.3d 546, 548 (1st Cir. 2005).

¹⁵ *Id.*

¹⁶ *Id.*

There were two links in the email.¹⁷ The first link contained a URL¹⁸ labeled “Brochure.” When an employee clicked on the link, a two-page brochure about the Policy was opened.¹⁹ The second page of this brochure contained a statement that the Policy would encompass “employment discrimination and harassment claims,” followed by a list of examples which included “disability,” and that any employees who continued working after the effective date of the Policy’s adoption would be covered by its terms.²⁰ In a shaded box in the lower right-hand corner of the brochure’s second page, an assertion stated that this Policy was the “exclusive means of resolving workplace disputes for legally protected rights,” and that if a lawsuit were filed by an employee, General Dynamics would reference the Policy and ask the court for a dismissal.²¹ The second link in the email was labeled “Handbook,” and accessed a 26-page dispute resolution handbook containing the Policy in its entirety.²² The handbook also contained a flow chart illustration, forms for filing claims, and a list of questions and answers regarding the Policy.²³

Several months after emailing the Policy, General Dynamics fired an employee named Roderick Campbell because he was continuously late or absent for work.²⁴ Campbell worked at General Dynamics as an at-will employee, holding a full-time salaried position.²⁵ He suffered from sleep apnea,²⁶ a medical condition involving nighttime breathing interruptions

¹⁷ *Id.*

¹⁸ The acronym ‘URL’ stands for ‘Uniform Resource Locator.’ A URL is a standardized address name layout for resources on the Internet. *See* Wikipedia, <http://en.wikipedia.org/wiki/URL> (last visited Feb. 19, 2006). While the appellate court entitles the URL “Brochure,” the district court referred to it as “dispute_resolution.htm.” It is possible that the web address was entitled Brochure as a link in the email, but this is not accurately described as a URL.

¹⁹ *Campbell*, 407 F.3d at 548.

²⁰ *Id.*

²¹ *Id.*

²² *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 321 F. Supp. 2d 142, 145 (D. Mass. 2004).

²³ *Campbell*, 407 F.3d at 548.

²⁴ *Id.* at 549.

²⁵ *Id.* The appellate court has Campbell beginning employment at General Dynamics on June 6, 2000, while the district court has Campbell working there from February 18, 2000. He was terminated on December 30, 2002.

²⁶ *Id.*

which can cause a person to be overly tired.²⁷ Claiming that he was discharged because of his medical condition, Campbell brought suit against General Dynamics for disability discrimination²⁸ under the Americans with Disabilities Act (ADA)²⁹ and Massachusetts state law.³⁰

General Dynamics removed Campbell's action to federal court.³¹ After removing the claim, General Dynamics invoked the Federal Arbitration Act (FAA)³² and moved to stay the federal court proceedings and compel Campbell to arbitrate his claims in accordance with the Policy.³³ General Dynamics argued that the company's Policy had been implemented while Campbell was employed, that the Policy applied to Campbell's case, and that

²⁷ For a brief overview of the medical condition of sleep apnea, see *Breathing Problems During Sleep*, 285 JAMA 2936 (2001), available at <http://jama.ama-assn.org/cgi/reprint/285/22/2936>. For a more technical description, see Sleep Apnea Information and Resources, <http://www.stanford.edu/~dement/apnea.html> (last visited Feb. 21, 2006).

²⁸ Employees with sleep apnea have rarely been successful bringing ADA claims against the employers who fired them. Usually summary judgment is rendered on behalf of the employer. See, e.g., *Brown v. Triboro Coach Corp.*, 153 F. Supp. 2d 172 (E.D.N.Y. 2001); *Mont-Ros v. City of West Miami*, 111 F. Supp. 2d 1338 (S.D. Fla. 2000); *Taylor v. Blue Cross & Blue Shield of Tex., Inc.*, 55 F. Supp. 2d 604 (N.D. Tex. 1999); *Hill v. Metro. Atlanta RTA*, 77 F. Supp. 2d 1291 (N.D. Ga. 1999). Appeals from employees with sleep apnea pursuing an ADA claim have been unsuccessful. See *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999); *Cartwright v. Lockheed Martin Util. Servs.*, 40 Fed. Appx. 147 (6th Cir. 2002).

²⁹ 42 U.S.C. §§ 12101–12213 (2000). The ADA is available online at http://www.law.cornell.edu/uscode/html/uscode42/usc_sup_01_42_10_126.html. See also *infra* note 54. Sleep apnea has been a particularly controversial disability under the ADA. See Kelly Cahill Timmons, *Accommodating Misconduct Under The Americans with Disabilities Act*, 57 FLA. L. REV. 187, 259 (2005) (discussing *Brohm v. JH Props., Inc.*, 947 F. Supp. 299, 300–01 (W.D. Ky. 1996), *aff'd*, 149 F.3d 517 (6th Cir. 1998), in which an anesthesiologist with sleep apnea was discharged for falling asleep during surgical procedures); William B. Lovett, Jr., Note, *Supreme Court's Clarification of the Effect of "Mitigating Measures" in Disability Determinations Muddies Disabilities Waters: Sutton v. United Airlines, Inc.*, 21 MISS. C. L. REV. 153, 168–69 (discussing *Taylor v. Blue Cross and Blue Shield of Texas*, 55 F. Supp. 2d 604, 611 (N.D. Tex. 1999), in which a sales instructor whose sleep apnea was relieved by a medical device was not considered disabled within the meaning of the ADA).

³⁰ MASS. GEN. LAWS ch. 151B, § 4 (2003). Campbell initially filed his complaint with a state administrative agency, the Massachusetts Commission Against Discrimination. He later withdrew that complaint and filed suit in Massachusetts state court.

³¹ Pursuant to 28 U.S.C. §§ 1331, 1367, 1441 (2000).

³² 9 U.S.C. §§ 1–16.

³³ 9 U.S.C. §§ 3, 4.

it required him to refer his claims to mandatory arbitration.³⁴ Campbell claimed not to have read the Policy and had no memory of receiving the email containing the policy.³⁵ General Dynamics nevertheless endeavored to hold Campbell to the allegedly unviewed agreement to bring all suits to arbitration.³⁶ General Dynamics contended that the Policy forged an enforceable agreement to arbitrate all employment-related claims, and that it prevented Campbell from bringing his ADA claim in federal court because arbitration was the exclusive means of resolution.³⁷ Campbell responded with two arguments: 1) that the Policy was unenforceable because the company's email failed to give him adequate notice, and thus he was not bound by it; and 2) that an email communication is not a writing, and thus the Policy did not satisfy the "written provision" requirement of 9 U.S.C. § 2.³⁸

The district court denied the defendant's motion to stay the proceedings and compel arbitration.³⁹ The court determined that the company's efforts to notify the plaintiff about the Policy were insufficient to extinguish his right to a judicial forum for his disability discrimination claims.⁴⁰ The court focused on the characteristics of email as a form of notification and declared that "a mass email message, without more, fails to constitute the minimal level of notice required" to enforce an agreement to arbitrate ADA claims.⁴¹ The court concluded "that the notice was wanting" and that "enforcement of the waiver would be inappropriate."⁴² Because the court found that "General Dynamics' efforts to notify its employees of the [Policy] so clearly fail against Campbell's first argument," it did not address the second argument of whether an electronic communication can constitute a written agreement under the FAA.⁴³

³⁴ *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 549 (1st Cir. 2005).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 549.

³⁹ *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 321 F. Supp. 2d 142, 150 (D. Mass. 2004). In a separate order, the court struck the related affirmative defense and denied the plaintiff's request for sanctions.

⁴⁰ *Id.* at 149.

⁴¹ *Id.*

⁴² *Campbell*, 407 F.3d at 547.

⁴³ *Campbell*, 321 F. Supp. 2d at 145.

General Dynamics appealed the denial of its motion to stay proceedings and compel arbitration and the order striking its affirmative defense.⁴⁴ The appellate court⁴⁵ affirmed the lower court's decision.⁴⁶ The court held that the mandatory arbitration agreement contained in the Policy that was linked to the company's email was unenforceable.⁴⁷ This particular email announcement was found to be insufficient for putting an employee on notice that his right to access a judicial forum was extinguished.⁴⁸ The court also addressed Campbell's second argument and declared that an email can satisfy the FAA's requirement for a written agreement because of the E-Sign Act.⁴⁹

III. THE COURT'S REASONING

A. *The FAA and the ADA*

After giving a brief history of the FAA and its interpretation by the Supreme Court,⁵⁰ the appellate court stated:

When a party relies on the FAA to assert a contractual right to arbitrate a claim arising under a federal employment discrimination statute, the court must undertake a supplemental inquiry . . . [which] . . . grows out of the principle that while federal statutory claims can come within an arbitration

⁴⁴ *Campbell*, 407 F.3d at 550.

⁴⁵ Because orders refusing stays and orders denying petitions to compel arbitration (under section 3, *see* 9 U.S.C. § 16(a)(1)(A), and under section 4, *see* 9 U.S.C. § 16(a)(1)(B), respectively) are statutory exceptions to the final judgment rule created by the FAA, the appellate court claimed jurisdiction to review the lower court's denial of the company's motion to stay proceedings and compel arbitration. The court cited *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 6 (1st Cir. 2005). However, the appellate court stated that it did not have jurisdiction to review the district court's order striking the company's affirmative defense, because such an order did not implicate the FAA under 9 U.S.C. § 16(a)(1) or (a)(3). *Campbell*, 407 F.3d at 547, n.3.

⁴⁶ *Campbell*, 407 F.3d at 547 n.3.

⁴⁷ *Id.* at 558.

⁴⁸ *Id.*

⁴⁹ *See infra* note 109.

⁵⁰ The *Campbell* court's discussion included an overview of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995); *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643 (1986); and *Perry v. Thomas*, 482 U.S. 483 (1987).

agreement that is enforceable pursuant to the FAA, some federal statutory claims may not be appropriate for arbitration.⁵¹

This “supplemental inquiry focuses on whether the agreement to arbitrate is enforceable with respect to the particular statutory claim at issue (here, the plaintiff’s ADA claim),” and the party resisting arbitration bears the burden of showing “that Congress, in enacting a particular statute, intended to preclude a waiver of a judicial forum for certain statutory claims.”⁵²

Campbell’s case was brought as an employment discrimination case under the ADA.⁵³ The ADA expressly encourages arbitration of disputes under some circumstances involving disability discrimination.⁵⁴ The First Circuit previously held that ADA claims were not beyond the FAA’s reach in

⁵¹ *Campbell*, 407 F.3d at 552 (citing *Gilmer*, 500 U.S. at 26).

⁵² *Id.*

⁵³ The Americans with Disabilities Act (ADA) requires employers to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the employer’s business. 42 U.S.C. § 12112(b)(5)(A) (2000). The ADA defines “disability” to include (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2) (2000). A disabled individual is otherwise “qualified” if he or she, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8) (2000). *See generally* Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27 (2000) (providing a general history, overview, and reconsideration of the ADA). The author considers ADA to be “the culmination of the civil rights movement.” *Id.* at 30.

⁵⁴ “[W]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter.” 42 U.S.C. § 12212 (2000). For a discussion of arbitration in the context of the ADA, see Jeffrey P. Ferrier, *ADA and ADR: Approaching an Adequate Adjudicatory Allocation*, 45 CATH. U. L. REV. 1281, 1284 (1996) (endeavoring to answer the question of “whether it is ‘appropriate,’ under the ADA, for ADR agreements to be a disabled individual’s sole remedy for alleged acts of discrimination.”). For a critical view of the use of arbitration under the ADA, see generally Wendy S. Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443 (1993) (suggesting that a voluntary settlement, in which both parties consent to being bound solely to arbitration, is the only valid use of arbitration for ADA claims). For an analysis of mediation under the ADA, see Ann C. Hodges, *Dispute Resolution under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN. L.J. AM. U. 1007, 1053 (1996).

the case of *Bercovitch v. Baldwin Sch., Inc.*⁵⁵ While *Bercovitch* found “that the ADA did not necessarily prohibit enforcement of a waiver of a right to a judicial forum,” it did not answer “whether agreements involving such waivers are enforceable as long as they meet the requirements of the FAA,” nor “whether [42 U.S.C.] section 12212 should be understood to impose a further, independent limitation on the enforceability of such agreements.”⁵⁶ The *Campbell* court cited *Wright v. Universal Maritime Service Corp.*,⁵⁷ where

the Supreme Court gave force to the word “appropriate” in § 12212 by finding that it would not be appropriate . . . to enforce an agreement to arbitrate employment discrimination claims, contained in a collective bargaining pact, where a union’s waiver of employee rights was not “clear and unmistakable.”⁵⁸

But the Supreme Court “expressly declined to consider whether to extend it to individual waivers and refrained from commenting on the meaning of the word ‘appropriate’ in the latter context.”⁵⁹

⁵⁵ 133 F.3d 141, 149–50 (1st Cir. 1998).

⁵⁶ *Campbell*, 407 F.3d at 553 (1st Cir. 2005).

⁵⁷ 525 U.S. 70 (1998).

⁵⁸ *Campbell*, 407 F.3d at 553 (citations omitted). “Our conclusion that a union waiver of employee rights to a federal judicial forum for employment discrimination claims must be clear and unmistakable means that, absent a clear waiver, it is not ‘appropriate,’ within the meaning of this provision of the ADA, to find an agreement to arbitrate.” *Wright*, 525 U.S. at 82 n.2. For discussions of the Supreme Court’s various rulings interpreting the ADA, see generally Ronald Turner, *The Americans with Disabilities Act and the Workplace: A Study of the Supreme Court’s Disabling Choices and Decisions*, 60 N.Y.U. ANN. SURV. AM. L. 379 (2004). Turner argues that

the Court’s interpretations of the ADA’s provisions and its rulings have provided rough sledding for plaintiffs, have evinced a narrow conception of disability and a resulting reduction in the scope of federal disabilities discrimination law, and have not provided employees with the protection anticipated and desired by the law’s proponents.

Id. at 382. See also Bonnie Poitras Tucker, *The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000) (focusing on three decisions of the Court which “drastically curtailed the number of persons who may seek protection from discrimination on the basis of disability under the ADA and seriously limited the circumstances under which even individuals with obvious disabilities may seek protection from discrimination”).

⁵⁹ *Campbell*, 407 F.3d at 553 (citing *Wright*, 525 U.S. at 82 n.2).

B. Appropriateness under *Rosenberg*

In order to prevail, General Dynamics needed to successfully establish two things: 1) "that the provision for mandatory arbitration [was] part of a valid contract within the purview of the FAA," and 2) that "the enforcement of the arbitration provision would be appropriate under the ADA."⁶⁰ The First Circuit called these "independent, yet overlapping, issues."⁶¹ In addressing whether enforcement of the arbitration agreement was appropriate in *Campbell*, the court relied on *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*⁶² *Rosenberg* addressed the effect of language in the Civil Rights Act of 1991 that was identical to the language found in the ADA, regarding the enforceability of arbitration agreements involving employment discrimination claims.⁶³ The *Rosenberg* court focused on Congress's assertion that agreements to arbitrate should be enforced only when it was "appropriate" to do so,⁶⁴ and interpreted "appropriate" as "prompting an additional, independent inquiry into the appropriateness of restricting access to a judicial forum or of compelling arbitration in a particular federal statutory case."⁶⁵ The *Campbell* court reasoned that the interpretation of the term "appropriate" in *Rosenberg* was fully applicable in *Campbell*, because the statute in *Rosenberg*⁶⁶ contained language which "mirror[ed] the language found in the ADA," and the statute applied directly to the ADA.⁶⁷ The *Campbell* court noted, however, that "[t]he appropriateness analysis is

⁶⁰ *Id.* at 554–55.

⁶¹ *Id.* at 555.

⁶² 170 F.3d 1 (1st Cir. 1999). See generally Miriam A. Cherry, Case Comment, *A Negotiation Analysis of Mandatory Arbitration Contracts*, 4 HARV. NEGOT. L. REV. 269 (1999) (summarizing the facts and legal issues involved in the *Rosenberg* case). Judge Nancy Gertner, the district court judge who decided *Campbell*, also wrote the lower court's decision in *Rosenberg*, which was affirmed by the appellate court. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998).

⁶³ See *Rosenberg*, 170 F.3d at 18–19.

⁶⁴ *Campbell*, 407 F.3d at 553 (citing *Rosenberg*, 170 F.3d at 19–21).

⁶⁵ *Id.* at 553–54.

⁶⁶ Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991). For an overview of the Civil Rights Act of 1991, see generally Symposium, *The Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994) (providing a myriad of perspectives on the Act, its effectiveness, and its legacy).

⁶⁷ *Campbell*, 407 F.3d at 553 n.4.

case-specific,” and that other circuits had disagreed with *Rosenberg’s* interpretation of “appropriate.”⁶⁸

The *Rosenberg* decision cited *Wright v. Universal Maritime Service Corp.*,⁶⁹ which held that a waiver of a judicial forum must be “clear and unmistakable”⁷⁰ to be enforceable, and that “there must be some minimal level of notice to the employee that statutory claims are subject to arbitration,”⁷¹ although a lesser standard than “clear and unmistakable” applies in the context of private agreements.⁷² Though the *Rosenberg* decision dealt with the 1991 Civil Rights Act, the decision explicitly noted that the ADA used similar language. The First Circuit reiterated “Congress’s concern that agreements to arbitrate employment discrimination claims should be enforced only where ‘appropriate,’” noting that this concern was “not expressed in the FAA or at common law.”⁷³

In applying *Rosenberg’s* holding⁷⁴ that “the employer must afford ‘some minimal level of notice to the employee that statutory claims are subject to arbitration’ in order for arbitration to be deemed appropriate,”⁷⁵ the *Campbell* court analyzed whether the email from General Dynamics

⁶⁸ *Id.* at 554 (citing *Haskins v. Prudential Ins. Co.*, 230 F.3d 231, 241 (6th Cir. 2000) (finding it “unwise to require a heightened standard that arbitration be ‘appropriate’ without a clear Congressional requirement to do so, especially in light of the strong federal policy favoring arbitration”); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998) (reading the clause “where appropriate and to the extent authorized by law” as referring to the FAA); *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 149 (2d Cir. 2004) (declining to adopt *Rosenberg’s* interpretation of “appropriate” in a securities employment case involving an arbitration agreement)). One contrary example cited was *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (holding that the word “appropriate” tends to limit the enforcement of arbitration provisions to situations in which the plaintiff “has knowingly agreed to submit such disputes to arbitration”).

⁶⁹ 525 U.S. 70 (1998). See generally Jacob E. Tyler, Case Comment, *Mandatory Arbitration of Discrimination Claims under Collective Bargaining Agreements: The Effect of Wright*, 4 HARV. NEGOT. L. REV. 253 (1999) (assessing the impact of the *Wright* decision).

⁷⁰ *Wright*, 525 U.S. at 80.

⁷¹ *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 21 (1st Cir. 1999).

⁷² *Id.*

⁷³ *Id.* at 19.

⁷⁴ One judge on the First Circuit, J. Lipez, concurred solely for the sake of pointing out the ‘exemplary’ application of *Rosenberg* to *Campbell* by Judge Selya, and to affirm support for the *Rosenberg* precedent. *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 407 F.3d 546, 559 (1st Cir. 2005) (Lipez, J., concurring).

⁷⁵ *Campbell*, 407 F.3d at 554 (citing *Rosenberg*, 170 F.3d at 21).

provided this minimal level of notice to Roderick Campbell. The court stated that “[i]n many cases, an employer will be able to satisfy this relatively light burden by producing evidence demonstrating that the employee had actual notice of the agreement.”⁷⁶ In determining whether there was sufficiency of notice, the court asked whether the hyperlinked email “would have provided a reasonably prudent employee notice of the waiver.”⁷⁷ The court relied on the objective standard enunciated in *Rosenberg*,⁷⁸ which takes into consideration factors such as “the method of communication, the workplace context, and the content of the communication.”⁷⁹ According to the court, the General Dynamics Company did not meet that burden because they “did not bother to elicit from any employee” either 1) “an affirmation that he or she had read the email (much less the Policy),” or 2) an affirmation of awareness “that arriving for work the next morning would constitute binding acceptance of a new contractual term replacing court access with arbitration.”⁸⁰

C. The Company Email and Notice

The *Campbell* court focused on the question of whether the communication by email conveyed adequate notice of the mandatory arbitration agreement. The court concluded that the email’s text “did not carry the burden of providing fair warning that showing up for work the next day would result in a waiver of important rights.”⁸¹ The email failed to “state directly that the Policy contained an arbitration agreement” and that this agreement “was meant to effect a waiver of an employee’s right to access a

⁷⁶ *Id.* at 555. The court cited *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997). For an overview of *Gibson*, see Franklin G. Snyder, *The Pernicious Effect of Employment Relationships in the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 60 (2003).

⁷⁷ *Campbell*, 407 F.3d at 555.

⁷⁸ *Rosenberg*, 170 F.3d at 21 n.17.

⁷⁹ *Campbell*, 407 F.3d at 555. See generally Cherry, *supra* note 62. For a discussion of the *Rosenberg* standard in the context of a circuit split regarding the proper standard for determining waiver of a judicial forum in a pre-dispute arbitration agreement, see Jonathan H. Peyton, Note, *What Arbitration Clause?: The “Appropriate” Standard for Measuring Notice of Binding Arbitration to an Employee*, 36 SUFFOLK U. L. REV. 745, 752–56 (2003) (discussing *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *Rosenberg*, 170 F.3d 1, and *Haskins v. Prudential Ins. Co. of Am.*, 230 F.3d 231 (6th Cir. 2000)).

⁸⁰ *Campbell*, 407 F.3d at 555.

⁸¹ *Id.* at 557.

judicial forum.”⁸² The email did not adequately portray the Policy’s contractual significance, and was not explicit enough to provide effective notice.⁸³ The textual language of the email was far more casual in its language and in its “tone and choice of phrase,” than the language in the Policy.⁸⁴ “While the Policy itself spoke in clear, contractual language . . . the email announcement descanted in an entirely different vocabulary, downplaying the obligations set forth in the Policy.”⁸⁵ The court further emphasized that the

text of the e-mail did not state either that the Policy contained contractually binding terms or that the employer would treat continued employment as an acceptance of those terms . . . [T]he e-mail’s description of the four-step dispute resolution procedure omitted the crucial fact that, as a matter of law, the regimen would become an employee’s exclusive remedy for employment-related claims of virtually every kind and description.⁸⁶

The email failed to specify that arbitration was mandatory.⁸⁷ “[W]hile the e-mail announcement communicated the notion that arbitration is a kinder, gentler alternative to litigation and had the company’s blessing, it did not suggest that arbitration was to become mandatory and thereby extinguish an employee’s access to a judicial forum as a means for dispute resolution.”⁸⁸

General Dynamics argued that the email was sufficient because it stated that the Policy was “an essential element of [the] employment relationship,” and because it requested the recipient to “review the enclosed materials carefully.”⁸⁹ The court replied that “[a]lthough these statements would indicate to a reasonable person that the employer regarded the Policy as important, they do not in and of themselves elucidate (or even intimate) the imposition of a mandatory agreement to arbitrate.”⁹⁰ The court continued,

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 557–58.

⁸⁷ *Id.* at 558.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* The court cited the Eighth Circuit case *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997), which “not[ed] that terms such as ‘I agree,’ ‘I accept,’ and ‘condition of employment’ distinguish legally significant communications from non-binding policies by imparting to an employee that the communication constitutes an enforceable contract.” *Id.*

“[T]he request to read certain materials did little to provide notice of a waiver of the right to access a judicial forum because the accompanying description of those materials failed to convey their legal significance.”⁹¹

The court highlighted that the lack of notice could “easily have been remedied,” and listed several ways that General Dynamics could have “set this particular communication apart from the crowd.”⁹² The company could have required a response to the email, but instead they “opted for a ‘no response required’ format.”⁹³ Because the company had a history of dealing with personnel matters by signed documents, the choice of an email “disguised the import of the communication.”⁹⁴ The court observed that “[s]igning an acknowledgment or, in a more modern context, clicking a box on a computer screen, are acts associated with entering into contracts,” and that “[r]equiring an affirmative response of that sort would have signaled that the Policy was contractual in nature.”⁹⁵ The court concluded that “the lack of that level of inexpensively obtainable formality made it less likely that the communication would spark a realization that the new Policy marshaled binding effects.”⁹⁶

The court was quite harsh in its assessment of the email from General Dynamics:

To be blunt, the e-mail announcement undersold the significance of the Policy and omitted the critical fact that it contained a mandatory arbitration agreement. The result was that a reasonable employee could read the e-mail announcement and conclude that the Policy presented an optional alternative to litigation rather than a mandatory replacement for it . . . [W]e conclude that it failed to put the recipient on inquiry notice of the unilateral contract offer contained in the linked materials.⁹⁷

Thus the appellate court affirmed the lower court’s finding that “sending a mass e-mail message, without more, fails to constitute the minimal level of notice required by the First Circuit under *Rosenberg* and other decisions.”⁹⁸

⁹¹ *Campbell*, 407 F.3d at 558.

⁹² *Id.* at 556.

⁹³ *Id.* at 557.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 558.

⁹⁸ *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 321 F. Supp. 2d 142, 149 (D. Mass. 2004).

D. The Handbook

Unlike the district court, the appellate court spent time addressing the handbook which was linked on the email, calling it "a final circumstance under which the communication might have conveyed sufficient notice."⁹⁹ Noting that "[p]ersonnel handbooks do not have uniform legal significance," the court cited three Massachusetts cases showing that an employee handbook may or may not be enforceable as a contract.¹⁰⁰ Whether the handbook provided notice depended on whether "a reasonable employee of General Dynamics would have known, given prior dealings between the company and its work force, that personnel handbooks operated as the functional equivalents of contracts," in which case "the introduction of a new policy and the fact of its promulgation in a reissued handbook might have sufficed to alert such an employee that the handbook contained legally binding terms."¹⁰¹ In this case, there was no evidence of any such use of personnel handbooks at General Dynamics to suggest that this particular handbook was a binding contract.¹⁰² Thus the court concluded that "the company's promulgation of a new handbook, without more, does not support a finding of adequate notice."¹⁰³

E. The Use of Email Generally in Forming Agreements

The appellate court disagreed with the district court concerning email as an appropriate medium for forming an arbitration agreement: "[T]he district

⁹⁹ *Campbell*, 407 F.3d at 558.

¹⁰⁰ *Id.* at 558–59. *See* O'Brien v. New Eng. Tel. & Tel. Co., 664 N.E.2d 843, 847–49 (Mass. 1996) (handbook met the requirements for the formation of a contract); Weber v. Cmty. Teamwork, Inc., 752 N.E.2d 700, 714 (Mass. 2001) (handbook not enforceable as contract); Jackson v. Action for Boston Cmty. Dev., 525 N.E.2d 411, 415 (Mass. 1988) (handbook not enforceable as contract); *see also* Margaret M. Pinkham & Emanuel Alves, *Employment Law Decisions: A First Look at the Massachusetts Equal Pay Act, and a Second Look at Employee Handbooks as Contracts*, BOSTON B.J., Jan./Feb. 1997, at 10, 11 (discussing the Massachusetts Supreme Judicial Court's expansion of circumstances under which such employment handbooks or manuals might create enforceable contractual obligations).

¹⁰¹ *Campbell*, 407 F.3d at 559.

¹⁰² *Id.*

¹⁰³ *Id.* For a similar case involving email and a policy manual in which notice was found, *see* Highstone v. Westin Eng'g, Inc., 187 F.3d 548, 553 (6th Cir. 1999) (company provided reasonable notice by sending two emails notifying employees of changes to the policy manual and publishing the manual on-line).

court's opinion does exhibit a high degree of skepticism about the use of e-mail in this context. We do not share that skepticism: we easily can envision circumstances in which a straightforward e-mail, explicitly delineating an arbitration agreement, would be appropriate."¹⁰⁴ The appellate court put the lower court's ruling in the context of "enumerating several ways in which General Dynamics readily and inexpensively could have made this particular e-mail notice more informative."¹⁰⁵ The court added, "The district court sharply discounted General Dynamics's case based on its use of this particular medium [that is, a mass email]. We question the extent of that discount."¹⁰⁶

The appellate court also answered the question the lower court left open, regarding whether an electronic communication can constitute a written agreement under the FAA.¹⁰⁷ The appellate court referred to The Electronic Signatures in Global and National Commerce Act (the E-SIGN Act),¹⁰⁸ which provides that "with respect to any transaction in or affecting interstate or foreign commerce," a "signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form."¹⁰⁹ The court stated that the E-SIGN Act "likely precludes any flat rule that a contract to arbitrate is unenforceable under the ADA solely because its promulgator chose to use e-mail as the medium to effectuate the agreement."¹¹⁰ According to the appellate court:

This statute definitively resolves the issue . . . as to whether an e-mail agreement to arbitrate is unenforceable under the FAA because it does not satisfy the FAA's 'written provision' requirement . . . By its plain terms, the

¹⁰⁴ *Campbell*, 407 F.3d at 555–56.

¹⁰⁵ *Id.* at 555.

¹⁰⁶ *Id.*; see *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 321 F. Supp. 2d 142, 148–49 (D. Mass. 2004).

¹⁰⁷ *Campbell*, 407 F.3d at 556; see *Campbell*, 321 F. Supp. 2d at 150.

¹⁰⁸ The Electronic Signatures in Global and National Commerce Act (E-SIGN Act), Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. §§ 7001–31). The E-SIGN Act is available at <http://www.ftc.gov/os/2001/06/esign7.htm> (last visited Feb. 21, 2006). See generally Steven Domanowski, Comment, *E-SIGN: Paperless Transactions in the New Millennium*, 51 DEPAUL L. REV. 619, 645 (2001) ("The general rule established by E-SIGN is that a contract, signature, or other record related to any transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form."); Michael J. Hays, Note, *The E-SIGN Act of 2000: The Triumph of Function over Form in American Contract Law*, 76 NOTRE DAME L. REV. 1183 (2001).

¹⁰⁹ *Campbell*, 407 F.3d at 556 (citing 15 U.S.C. § 7001(a)).

¹¹⁰ *Id.*

E-Sign Act prohibits any interpretation of the FAA's 'written provision' requirement that would preclude giving legal effect to an agreement solely on the basis that it was in electronic form.¹¹¹

IV. CONCLUSION—WHAT COMPANIES SHOULD DO NOW

Companies have reasons and financial incentives to create mandatory arbitration agreements.¹¹² However, if they wish to communicate such important information to employees by email, they should ensure that adequate measures are taken so that employees are made aware of the importance of the content of the email. The *Campbell* court cautioned that its holding "should not be read as a general denunciation of e-mail as a medium for contract formation in the workplace."¹¹³ But under *Campbell*, merely sending a mass email, without more, probably fails to meet the minimal level of notice required. A company wishing to make a new policy known to its employees will need to go beyond the means chosen by General Dynamics, taking more positive steps to ensure notice.¹¹⁴ An email that is intended to be

¹¹¹ *Id.* (internal citation omitted). The court cited *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 26 n.11 (2d Cir. 2002). Surprisingly few cases have addressed the E-SIGN Act. Excluding *Campbell* and *Specht*, at the time of this writing, only two other cases have addressed the E-SIGN act: *Prudential Ins. Co. of Am. v. Prusky*, No. 04-CV-462, 2005 U.S. Dist. LEXIS 14778 (E.D. Pa. 2005), and *In re Cafeteria Operators, L.P.*, 299 B.R. 411 (Bankr. N.D. Tex. 2003).

¹¹² See, e.g., DAVID KEHRER, *Tactic 175—Write Arbitration Clauses into Your Company's Contracts*, in *SAVE YOUR BUSINESS A BUNDLE: 202 WAYS TO CUT COSTS AND BOOST PROFITS NOW—FOR COMPANIES OF ANY SIZE* 270 (1994); see also Barton A. Bixenstine, *Mandatory Arbitration of Employment Claims*, in *THE BEST OF LABOR AND EMPLOYMENT LAW* 7.1 (Carl F. Muller ed., 2002) (giving historical overview of employers using mandatory arbitration for employment claims, and the Supreme Court's increasing willingness to endorse this approach).

¹¹³ *Campbell*, 407 F.3d at 555.

¹¹⁴ See, e.g., *Caley v. Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367 (N.D. Ga. 2004). The company mailed to all of the workers in one facility a copy of the dispute resolution policy, an explanatory cover letter, and a question and answer form (mailed by an outside company with first-class postage). *Id.* at 1371–72. The company also placed the policy and accompanying information on the company intranet, and distributed the policy electronically through a newsletter that was emailed to all the employees. *Id.* at 1372. Finally, the company posted notices relating to the implementation of the policy (but not the policy itself) on several bulletin boards throughout the company facility. *Id.* The court held that the policy was an enforceable agreement to arbitrate under state law, and that mandatory arbitration of the specific claims brought by plaintiffs did not offend federal policy under the FAA. *Id.* at 1377–78. The defendant company's motions to compel arbitration and their motions to dismiss were granted. *Id.* at 1379.

a binding contract should be explicit and well-defined in its terms.¹¹⁵ Companies would be advised to provide some way of assuring that their employees received notice—for, example, by requiring a signed response. If Campbell had responded to General Dynamics by affirming his agreement to the Policy, notice would have been adequate. A company can elicit such a response using a form that the employee must sign in order to agree to the contents,¹¹⁶ or holding a meeting to discuss the new policy where attendance is taken.¹¹⁷

Other courts that have addressed the general issue of notice of company policies via email have found electronic distribution of the information to be sufficient if combined with other means.¹¹⁸ A company may be able to

¹¹⁵ See, e.g., *PFT Roberson, Inc. v. Volvo Trucks N. Am., Inc.*, 420 F.3d 728 (7th Cir. 2005) (open-ended email did not create binding contract).

¹¹⁶ In a similar case, however, a signed and returned form was not sufficient because it did not directly mention arbitration. See *Carfagno v. ACE, Ltd.*, Civil No. 04-6184, 2005 U.S. Dist. LEXIS 12614 (D.N.J. 2005). Several employees received an email from the employer's human resources department which announced an online employee guide. *Id.* at *3. The email did not mention that employees would be required to agree to mandatory and binding arbitration. *Id.* at *5. The email (unlike in *Campbell*) included a "Receipt and Agreement" form, but the employees claimed that because the form did not mention arbitration, they could not be held to have validly agreed to arbitrate. *Id.* at *32. The court agreed with the employees and held that the form was not an enforceable waiver of the employees' right to sue in a judicial forum. *Id.*

¹¹⁷ This provided sufficient notice for upholding the enforcement of a mandatory dispute resolution policy against a discrimination claim in *Hightower v. GMRI, Inc.*, 272 F.3d 239, 241 (4th Cir. 2001). The plaintiff attended a meeting announcing the policy and signed a form that stated, "I have attended a DRP meeting and have received the information in regards to DRP." *Id.*

¹¹⁸ See *Mannix v. County of Monroe*, 348 F.3d 526 (6th Cir. 2003) (holding that reasonable notice was provided concerning a new policy when meetings were held between department heads and employees in addition to emails being sent containing the information). In *Mannix*, a county employee claimed that although he knew of the posting of new company policies on the computer email system, he had not read them and therefore did not receive notice. The court found that the material issue was whether reasonable notice, as opposed to actual notice, was given to the employee. *Id.* at 536. Because the revised policies had been posted on an internal database available to all employees, meetings were held between department heads and employees, and the policies were sent out on the county's email system, the court concluded that reasonable notice was provided. *Id.* The court noted that under the electronic distribution system, in contrast to the older hard copy distribution of revised policies, no proof of actual receipt was collected. *Id.* However, due to the "advancement and ubiquity of electronic corporate communications," the court would not "return to older practices by imposing a paper receipt requirement." *Id.*

overcome the notice standard merely by making the email more explicit.¹¹⁹ Using hyperlinks to announce a change of policy may be sufficient as long as other means are provided.¹²⁰ And while posting a policy on the company's intranet alone may not be sufficient,¹²¹ if an intranet posting is combined

¹¹⁹ See *Marlar v. Yellow Transp.*, No. 03-1042-CV-W-HFS, 2004 U.S. Dist. LEXIS 26653 (W.D. Mo. 2004). Prior notice of a dispute resolution policy was provided to the employee by an email which stated that the policy would become a condition of employment, and that an employee who remained on the employer's payroll would be assenting to binding arbitration. *Id.* at *3. The court found that the email provided reasonable notice to the employee, *id.* at *9, and that the employee's suit for age discrimination in violation of the Age Discrimination Employment Act fell within the scope of the dispute resolution process. *Id.* at *21. The *Marlar* court distinguished *Campbell*:

Here, there was no attempt to hide or shade the DRP by attaching it to a vague email. Rather, the email announcing the implementation of the DRP clearly indicated such in the heading of the email. The email continues by alerting the reader to the effective date of the DRP, as well as many of the covered disputes. The email then sets out the procedural concerns, and in bold print, states that the DRP becomes a condition of employment after the effective date.

Id. (internal citations omitted).

¹²⁰ For an example of a hyperlinked arbitration clause that was upheld as a viable contract, see *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct. 2005). A buyer filled out forms on an Internet website for purchasing a computer. On the website a blue hyperlink accessed the "Terms and Conditions of Sale," which included an arbitration clause. The trial court ruled that the arbitration clause never became a part of the contract, and that nevertheless it was unconscionable and unenforceable. *Id.* at 117. The appellate court reversed, holding that the blue hyperlink taking the buyer to the "Terms and Conditions of Sale" made the clause conspicuous, and that the clause was enforceable. *Id.* at 121.

¹²¹ In *Acher v. Fujitsu Network Communs., Inc.*, 354 F. Supp. 2d 26 (D. Mass. 2004), an employer circulated the company's arbitration policy to all its employees, together with an explanatory memorandum, and posted the policy on the company's intranet. The employer argued that an employee who filed a wrongful termination suit had received sufficient notice of the arbitration policy. *Id.* at 36. The magistrate judge concluded that the employee did not receive notice of the policy, because the employer provided no evidence (such as a signed acknowledgment) that the employee actually received the policy and accompanying memorandum, nor any evidence (such as a sign-in sheet) that the employee attended any meetings at which the policy was discussed. *Id.* at 37. There was also no evidence that the employee learned that the policy could be found on the employer's intranet, or that he had accessed the policy on the website. *Id.*

with direct and explicit email notification, that may provide reasonable notice.¹²²

After *Campbell*, companies wishing to enact a new policy would be advised to communicate with their employees in a more effective and conspicuous manner than mass email alone. Electronic communication can still be effective and useful, provided that the company takes steps to assure notice and assent if a policy announced in the email is expected to be legally binding.¹²³

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¹²² See *Mannix*, 348 F.3d 526 (holding reasonable notice provided when new policies were posted on an internal database available to all employees, in addition to emails describing the policy).

¹²³ Footnote 123 is available online, and applies to the entire Recent Development. The author created an electronic version of Footnote 123 for the sake of keeping this article continuously updated. The author intends Footnote 123 to be a perpetual resource for displaying further research on *Campbell*, its impact, and its progeny. If the URL should become inactive, this footnote's contents will be in the possession of the author and will be made available through another online source. The current URL of Footnote 123 is: http://3lepiphany.typepad.com/31_epiphany/2006/02/campbell_fn_123.html.

